No. 14,506

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT L. HALL,
Plaintiff and Appellant,

vs.

COPCO PACIFIC, LTD., a Delaware corporation,
Defendant and Appellee.

APPELLANT'S CLOSING BRIEF.

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Appellee's entire argument fails because it does not properly distinguish between matters of procedure and matters of substance.

I.

THE CLASSIFICATION OF THE CAUSE OF ACTION FOR PURPOSES OF APPLYING THE CALIFORNIA STATUTE OF LIMITATIONS IS PROCEDURAL AND IS GOVERNED NOT BY OREGON LAW BUT BY CALIFORNIA LAW.

In the last analysis, the only question involved in this appeal is whether the courts of California have the right to characterize or classify a foreign cause

of action for the purpose of applying their own statute of limitations.

As appellee would have it, the California courts do not have this right but are bound by a decision of the Oregon courts (*Shelton v. Paris,* 261 Pac. 2d 856) classifying the cause of action for the purpose of applying their own statute of limitations.

The question, however, was long ago settled by the Supreme Court of the United States in the case of *Bank of U. S. v. Donnally,* 8 Pet. 361, 8 L.ed. 974, which involved an action brought in the United States District Court in Virginia upon a promissory note made in Kentucky. Under the Kentucky law, a promissory note was then regarded as being a specialty enforceable by an action of covenant, while under the law of Virginia, the forum, it was a simple contract enforceable by an action of assumpsit. The action was brought within the time limited by Virginia law for an action upon a specialty but not within the time limited for actions upon simple contracts. The court held that the action was barred by the shorter Virginia statute. Mr. Justice Storey delivered the opinion of the Court saying:

> "The general principle adopted by civilized nations is, that the nature, validity and interpretation of contracts, are to be governed by the law of the country where the contracts are made, or to be performed; but the remedies are to be governed by the laws of the country where the suit is brought; or, as is compendiously expressed, by the lex fori. No one will pretend, that because an action of covenant will lie in Kentucky, on an

unsealed contract made in that state, therefore a like action will lie in another state, where covenant can be brought only on a contract under seal. It is an appropriate part of the remedy, which every state prescribes to its own tribunals in the same manner in which it prescribes the times within which all suits must be brought.* * * *The remedy in Virginia, must be brought within the time, and in the mode, and according to the descriptive character of the instrument known to the laws of Virginia, and not by the description and character of it prescribed in another state.*

"If then it were admitted that the promissory note now in controversy were a specialty by the laws of Kentucky, still it would not help the case, unless it were also a specialty and recognized as such by the laws of Virginia; for the law of the latter state must govern as to the limitation of suits in its courts, and as to the interpretation of the words used in its own statutes." (Emphasis added.)

More recent decisions to the same effect are to be found in the cases of *Burns Mortgage Co. v. Hardy,* 94 Fed. 2d 477, and *Alropa Corp. v. Kirchwehn* (Ohio S.Ct.), 33 N.E. 2d 655, both of which cite the above case with approval.

Also to the same effect is the case of *Miller v. Lane,* 160 Cal. 90, cited at page 9 of appellant's opening brief, in which the Supreme Court of California held that it would classify according to California law an action brought to enforce a stockholder's liability under Colorado law, for the purpose of applying the

California statute of limitations, although the Colorado courts had classified the action differently.

We cannot agree with appellee's contention that *Miller v. Lane* (supra) was overruled by the California Supreme Court in the case of *State of Ohio ex rel. Squire v. Porter,* 21 Cal. 2d 45 (cited at page 15 of appellee's brief) in which the California Supreme Court held that the Ohio law would determine *when the cause of action was created.* The creation and existence of the cause of action goes to the substance of the cause of action itself and is quite a different matter from classification of the cause of action for purposes of applying the statute of limitations. The case of *Miller v. Lane* stands for a different principle and was not even mentioned by the California Supreme Court in the latter decision, let alone overruled.

The other California stockholder's liability case cited by appellee at page 16, *State of Ind. v. Hoffman,* 53 C.A. 2d 706, is distinguishable on the same ground; it also involved the question as to when the cause of action was created.

Similarly the remaining cases cited appellee's brief, pp. 16 and 17) all involved questions going to the substance of the cause of action itself and are therefore not pertinent to the question of simple classification or description of the cause of action which is involved in this appeal.

II.

THE MERE CLASSIFICATION BY CALIFORNIA LAW OF A FOREIGN CAUSE OF ACTION FOR PURPOSES OF APPLYING THE CALIFORNIA STATUTE OF LIMITATIONS DOES NOT DENY FULL FAITH AND CREDIT TO THE LAW OF OREGON.

In the case of *Wells v. Simonds Abrasive Co.,* 345 U.S. 514, 73 S.Ct. 856, 97 L.ed. 1211, the Supreme Court reiterated the principle, which has long been the law, that a state by refusing to apply the statute of limitations of the state where the cause arose, which had run, and allowing a recovery under its own law, does not deny full faith and credit to the law of the sister state.

Similarly, it is difficult to see how the mere classification of the cause of action, which is required to be made in order to apply properly the statute of limitations of the forum, could be any more of a denial of full faith and credit than the application of the statute itself, even though contrary to a decision of the sister state classifying the cause for the purpose of applying its own statute of limitations.

It has frequently been held that the full faith and credit clause of the United States Constitution is not violated where the mere construction of a statute is involved, without challenging the validity thereof.

Penn. Fire Ins. Co. v. Gold Issue Min. & Mill Co., 243 U.S. 93, 37 S.Ct. 344, 61 L.ed 610;

Smithsonian Inst. v. St. John, 214 U.S. 19, 29 S.Ct. 601, 53 L.ed. 892.

Finally, it is indicated in the leading case of *Klaxon v. Stentor El. Mfg. Co.,* 313 U.S. 486, 85 L.ed. 1477,

that the full faith and credit clause is not involved where the state courts are merely applying their own rules of procedure, or refusing to apply the procedural rules of the sister state.

III.

THE CALIFORNIA CASE OF RIDEAUX v. TORGRIMSON ESTABLISHES THE STATUTORY NATURE OF APPELLANT'S CAUSES OF ACTION.

The various differences between the Oregon Workmen's Compensation Act and the California Act are actually differences without any legally significant distinctions.

In the first appeal in the case of *Rideaux v. Torgrimson,* 12 Cal. 2d 633, the California Supreme Court pointed out the special features of the employees' right of action under section 29b of the Workmen's Compensation Act (Labor Code, sec. 3706) against the uninsured employer, which to its way of thinking fixed the character of the right as being statutory rather than common law.

These were (1) that the right of action was conditioned upon the employer's failure to insure (2) that the employer's negligence was presumed and (3) that the common law defenses of contributory negligence, assumption of risk and the fellow servant rule were not available to the employer.

With the sole exception of the presumption of the employer's negligence, these are the salient features also of the Oregon Act. The cause of action does

not exist against an employer who has insured (Ore. Rev. Stats., Sec. 656.560 (5)) and the employer has been deprived of the defenses of contributory negligence, assumption of risk and fellow servant rule (Ore. Rev. Stats. Sec. 656.324 (4)).

The fact that the Oregon statute may not supply a complete system of workmen's compensation is immaterial because the right that appellant claims happens to be covered by both the Oregon statute and the California statute.

Prior to the enactment of the compensation laws in California, the employee had a common law action against his employer. The California Compensation Act "extended" (to use the language of the Oregon court in *Shelton v. Paris,* supra) the right of action with certain modifications as did the Oregon Act. But the California court has clearly indicated in the *Rideaux* case that it does not regard this "extension" as continuing the common law nature of the right of action.

It is not necessary, therefore, to speculate about what the California law might be. The Supreme Court of this state has said that the cause of action is statutory.

CONCLUSION.

It is therefore submitted that the classification of appellant's cause of action is a procedural matter which must be determined by California law. The California law holds the cause of action to be statu-

tory. The only part of the California statute of limitations which can properly be applied to the case is, therefore section 338(1) of the Code of Civil Procedure, with its three (3) year period of limitation.

The judgment of the trial court should, therefore, be reversed.

Dated, San Francisco, California,
February 11, 1955.

Respectfully submitted,
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